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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/584,638	05/31/2000	Marcos N. Novaes	POU9-2000-0010-US1	4280

46369 7590 02/23/2006

HESLIN ROTHENBERG FARLEY & MESITI P.C.
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EXAMINER

WON, MICHAEL YOUNG

ART UNIT PAPER NUMBER

2155

DATE MAILED: 02/23/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

09/584,638

Applicant(s)

NOVAES ET AL.

Examiner

Michael Y. Won

Art Unit

2155

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 30 January 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires ____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: 8-11,22,30-33,44,56-59 and 70.
Claim(s) objected to: _____.
Claim(s) rejected: 1,4-7,12,15-21,23-29,34,37-43,45,46,51-55,60,63-69,71 and 72.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Attached Document.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____.
13. ☐ Other: _____.

Response to Arguments

1. Applicants' argue that the examiner has not established a *prima facie* case of obviousness against the claims at issue because neither Ballard (US 6,078,960) nor Colby (US 6,006,264) recite the word "distribution configuration manager" and because the applicants' assert that Ballard teaches a systems administrator who provides the load balancing list and therefore teaches away from the existence of a distributed configuration manager.

The applicant is reminded that applicant acts as his or her own lexicographer therefore the specific description of the term is define in the claim language in terms of it's functionality.

Ballard teaches of prior art hardware load balancing device, which provides the load balancing at the server side (see col.5, lines 24-41). However, Ballard's invention is directed to load balancing or load apportionment at the client side, therefore, the information (ordered list) that the hardware load balancing device in the prior art system would use in making a determination is presented to the client giving the client the choice to select.

It is evident that the load balance list as taught by Ballard is created and distributed by the server (see col.6, lines 54-64 and col.7, lines 41-53). The references to the administrator in the Ballard patent is directed towards **updates** that are performed when additional servers are added due to load constraints or deleted in the event of a server failure, which is clearly known in the art. Clearly, a device and/or software

inherently perform the creation and distribution (see col.4, lines 53-56) because it would not be plausible and implicit for an administrator to create and ordered list each time a client requests for server access.

Furthermore, even if the applicants' assertion of the administrator is true, the functionality is clearly taught by Ballard. A manager by definition is a *person* who oversees multiple project and project managers, therefore the term "distribution configuration manager" will not distinguish the claimed invention in terms of patentability.

2. Applicants' argue that the examiner misinterprets the teachings of Ballard and Colby because of the above arguments, which have been addressed, and because the reference location provided (col.5, lines 33-48) does not teach, "creating using a predefined equation to order a plurality of service equations... ". The applicants' assert that the cited reference location is an "alternate implementation wherein a hardware load balancing device is employed". Ballard's alternate implementation clearly suggests a distribution configuration manager creating using a predefined equation.

However, even if the applicants' assertion was true, Ballard further teaches in column 6, lines 41-44 (*to replace col.5, lines 33-48*), "over time as the server selection function is **executed** over and over, the actual load percentage for each server computer in the list 54 **converges** to the specified percentages in the list 54". Clearly, the execution and convergence inherently implies that a "predefined equation" is used.

3. Applicants' argue that there is insufficient teaching, suggestion, or incentive to combine the references.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves **or in the knowledge generally available to one of ordinary skill in the art**. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Colby teaches of an ordered list specific for a client based on one or more characteristics of the client. Although Ballard's ultimate objective is to give the control to the client, it is also to balance the load so that the highest throughput will be achieved by presenting to the user several choices to reach the requested service. Clearly, it would have been obvious to combine the teachings because not all clients are located in the same geographic proximity and not all devices have the same capability. Therefore, by combining the teachings, the load percentages distributed to the clients would give a more accurate account of the load according to the location of the client and it's capabilities.

4. Applicants' argue that the references are nonanalogous art and that they are would not have been combined.

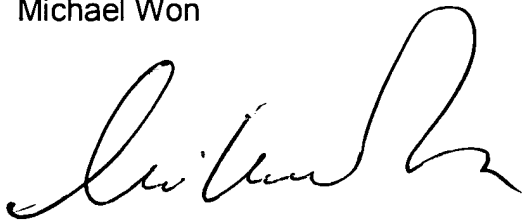
In response to applicant's argument that Ballard and Colby is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, again Ballard's ultimate objective is to give the control to the client, it is also to balance the load so that the highest throughput will be achieved by presenting to the user several choices to reach the requested service. Although the system of Colby is directed to the prior art system described in Ballard (see col.5, lines 24-41), the teachings of Colby specifically of an list ordered specifically for a client based on one or more characteristics is clearly analogous. The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Y. Won whose telephone number is 571-272-3993. The examiner can normally be reached on M-Th: 7AM-5PM.

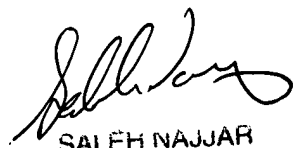
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Saleh Najjar can be reached on 571-272-4006. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Michael Won



February 10, 2006



SALEH NAJJAR
SUPERVISORY PATENT EXAMINER